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# *Supreme Court of the United States,*

*October Term*, 189

No. 1036

PETER DOUGHERTY,

*Plaintiff in Error,*

*vs.*

THE NEVADA BANK OF SAN FRANCISCO

(A CORPORATION),

*Defendant in Error.*

# BRIEF OF PLAINTIFF IN ERROR.

J. C. BATES,

*Attorney for Plaintiff in Error.*

# Supreme Court of the United States.

PETER DOUGHERTY,
*Plaintiff in Error,*
*vs.*
THE NEVADA BANK OF SAN FRANCISCO, (A CORPORATION),
*Defendant in Error.*
No.

## BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error here, the plaintiff in the Superior Court of the City and County of San Francisco, and appellant from the judgment against him to the Supreme Court of California, commenced this action on the 25th of April, A. D. 1878, against the defendant as owner of the lot of land described in the complaint, to foreclose a municipal tax, or street assessment lien (50 Cal., 522), made and issued April 11th, 1877, for grading Mason street, from Sacramento to California street, in said city and county, for the principal sum of $\$7,263\frac{50}{100}$. (Folios 21 and 22.)

The complaint is in the form prescribed by Sec. 13 of the Act of April 1st, 1872 (Stat. 1871–72, page 804 *et seq.*)

*Whiting* vs. *Townsend*, 57 Cal., 515.

The answer put in issue all the allegations of the complaint, except paragraph 14, which is in words and figures as follows:

"That defendant's grantor, Charity Hayward, who was the owner, appealed to said Board of Supervisors concerning the acts, proceedings and determination of said Superintendent in relation to the performance and acceptance of said work, and the assessment made and issued therefor, as aforesaid, and said Board, after due notice given as required by law, duly heard said appeal, and affirmed said assessment and all the acts of said Superintendent."

The answer also set up an affirmative defense (Trans., page 7, folio 13), alleging "that after July 20th, 1873, said contract null and void; that the time for the performance of said work had elapsed," * * and then defendant proceeds to state said contract null and void for the reason the extensions granted after the time fixed had expired, and therefore the pleader avers that the extension made without authority of law and void.

In 1866, the case of *Taylor* vs. *Palmer*, 31 Cal., 246, was decided by the Supreme Court of California, which construed Sec. 7 of the

Street Law as conferring power to extend time on contracts after the time fixed by Superintendent of Streets had expired; but subsequently, in 1879, and long after the contract in this case performed, the Supreme Court overruled the above case and gave a different construction to said Sec. 7 of the Street Law, hereafter inserted, and gave it a retroactive effect on contracts entered into, extensions made, work and labor performed under the faith and credit of the construction of the law as announced in 31 Cal., 246.

Whether the State by such act can impair and nullify the laws forming a part and parcel of our contract, is the question presented in this case.

The contract was valid when made, there is no question.

The Street Law of San Francisco of 1863, as expounded in said case of *Taylor* vs. *Palmer*, 31 Cal., 246, was re-enacted April 1st, 1872 (Stat. 1871-72, page 804 *et seq.*), and so much of the section and corresponding section of the said Act of April 1st, 1872, necessary to consider in this case are as follows:

STATUTE 1871-72, PAGE 808:

"SEC. 7. The Superintendent of Public Streets, Highways and Squares is hereby authorized, in his official capacity, to enter into all written contracts, and to receipt all bonds authorized by this Act, and to do any other acts, either express or implied, that pertain to the street department under this Act, and said Superintendent of Public Streets, Highways and Squares shall fix the time for the commencement and completion of the work under all contracts entered into by him, and may extend the time so fixed from time to time, under the direction of the Board of Supervisors; and it shall be the duty of the Superintendent of Public Streets, Highways and Squares, on the execution of a contract to perform street work, or on the passage of a resolution by the Board of Supervisors directing an extension of time to be granted to complete a contract, to cause the same to be recorded in the office of the County Recorder of the City and County of San Francisco; and in issuing a certificate of an extension of time to be recorded, to specify in the same the number of the resolution of the Board of Supervisors, the date thereof, and the number of days granted for completion of the contract, a general description of the work, with the date of indorsement of said extension upon the original contract; and prior to the execution of the contract, and prior to granting or indorsing upon a contract as aforesaid any extension of time, to collect from said contractor or his assigns the sum of three dollars for each contract, and the sum of fifty cents for each and every extension of time. And the County Recorder of the City and County of San Francisco shall cause books of record to be prepared, to be entitled Record of Street Contracts, in which all contracts for the performance of street work, and all extensions of time granted by the Board of Supervisors, as certified to by the Superintendent of Public Streets, Highways and Squares, shall be recorded; said books to be properly arranged and indexed, so as to facilitate reference thereto; and for each contract so recorded said County Recorder of the City and County of San Francisco shall charge and collect the sum of three dollars, and for each *extension*

of time the sum of *fifty cents;* and in *all cases where said Superintendent of Streets, Highways and Squares, under the direction of said Board of Supervisors, has extended the time for the performance of contracts, the same shall be held to have been legally extended.* The *work* provided for in section three of this Act *must in* ALL CASES, be done under the *direction* and to the *satisfaction* of the Superintendent of Public Streets, Highways and Squares, and the *materials* used shall be such as are required by the said Superintendent of Public Streets, Highways and Squares, and all contracts made therefor must contain this condition, and also express notice that in no case [except when it is otherwise provided in this Act], will the City and County of San Francisco be liable for any portion of the expense nor for any delinquency of persons or property assessed. The assessment and apportionment of the expenses of all such work in the mode herein provided shall be made by the said Superintendent of Public Streets, Highways and Squares."

STATUTE OF 1863, Page 525:

"SEC. 7. The Superintendent of Public Streets and Highways is hereby authorized, in his official capacity, to enter into all written contracts, and to receipt all bonds authorized by this Act, and to do any other acts, either express or implied, that pertain to the street department under this Act; and said Superintendent shall fix the time for the commencement and completion of the work under all contracts entered into by him, and may extend the time so fixed from time to time, under the direction of the Board of Supervisors. And in all cases where the Superintendent, under the direction of said Board, has extended the time for the performance of contracts, the same shall be held to have been legally extended. *And whenever, in any contract heretofore made, the said Superintendent has fixed the time for doing the work, or has extended the same, such acts shall be deemed and held to have been legally done,* and it shall so be held in all the Courts of this State; but this provision shall not apply to any contracts the work under which has not been commenced. The work provided for in section three of this Act, must, in all cases, be done under the direction and to the satisfaction of the Superintendent, and the materials used shall be such as are required by the said Superintendent; and all contracts made therefor must contain this condition, and also express notice that in no case [except where it is otherwise provided in this Act], will the city and county be liable for any portion of the expense, nor for any delinquency of persons or property assessed. The assessment and apportionment of the expenses of all such work, in the mode herein provided, shall be made by the said Superintendent of Public Streets and Highways."

It will be observed that the provision in the law of 1863, in words and figures, as follows: "*but this provision shall not apply to any contracts the work under which has not been commenced,*" were omitted in the Act of 1872, and that is all the substantial difference in Section 7 of 1863 and Section 7 of 1872, so far as the question involved here. Hence, the construction of Section 7 of 1863 would apply with the same force to the same section in the Act of 1872, both sections being substantially the same.

*Robinson* vs. *Fair*, 128 U. S., 89; *Turney* vs. *Dougherty*, 53 Cal., 620.

It will be further noticed that the Act of April 1st, 1872, was abrogated, or "*struck dead*," by the New Constitution adopted in 1879, *Thomason* vs. *Ruggles*, 69 Cal., 473, and that the decision in *Beveridge* vs. *Livingston*, 54 Cal., 54, was rendered by the Supreme Court, November Term, 1879, just as the old Court went out of existence, overruling a previous decision on the construction of a Statute followed for many years, and that too after the Statute had, in effect, become inoperative, and needed no longer any construction for future guidance, and after this contract performed and suit commenced.

The rule announced, 31 Cal., 246, was the law of the land on the construction of said Section 7 of the Street Law, and was overruled as to the construction of the law forming a material and very beneficial part of contracts for street work, and allowed by the decision in this case to *retroact* on contracts fully performed on the faith in the stability of judicial construction of the law forming part of our contract.

PROCEDURE FOR IMPROVEMENT OF STREETS.

The mode of procedure to improve streets in San Francisco at the expense of the property owners having frontage on streets under the Act of 1863 (Stats. 1863, page 525), or the Act of 1871 (Stats. 1871-72, page 804), substantially, as follows:

1. The adopting or passing a resolution of intention by the Board of Supervisors as a notice to do the work (Section 4.) (28 Cal., 375-6.)

2. The ordering said work to be done after the said resolution, or notice of intention, had been published in certain newspapers for ten (10) days.

3. The posting and publication of notice for bids for said work.

4. The opening said bids or proposals for said work in open session of the Board of Supervisors and awarding the contract therefor by said Board. (Section 6.)

5. The entering into a written contract for said work, with successful bidder, by the Superintendent of Streets; if the property owners should not elect to enter into the contract at the price awarded, during five days publication of the notice of the award. (Section 7.)

6. The law further prescribed (Section 7) that said Superintendent, in said written contract, among other things, "shall fix the time for the commencement and completion of the work under all contracts entered into by him, and may extend the time so fixed from time to time, under the direction of the Board of Supervisors;" Said Section 7 further provided (Ante, page 3,) as follows: "* * * and in all cases where said Superintendent, under the direction of said Board of Supervisors, has extended the time for the performance of contracts, the same shall be held to have been legally extended."

Said Section 7 also provided "*that the work in all cases must be done under the direction and to the satisfaction of the Superintendent of Streets.*"

7. After the contract performed, the Superintendent of Streets makes an assessment for the work (Section 9), and to said assess-

ment a diagram for description of lots annexed, and a warrant is issued to collect the same (Section 10). Said assessment, warrant and diagram are to be recorded, and the amounts assessed are liens on respective lots for two years only, unless suit commenced.

8. The contractor or assigns then makes personal demand of *the owner*, if assessed to him by name, or public demand on the premises if assessed to "unknown owner," for the assessment. (Section 11.)

9. The owner or contractor has fifteen (15) days to appeal to Board of Supervisors from the assessment, and all the decisions of the Board are declared "*final and conclusive.*" (Section 12.)

10. Any time after fifteen days from date of warrant, and *within two years*, suit may be commenced against *the owner* of the lot to foreclose the lien and sell the lot to pay for the work assessed (Section 13.)

The contract in this case (Trans., pages 14 and 15,) was dated January 15th, 1873, and provided that the work was to be commenced in six days and completed in one hundred and fifty days, and annexed to said contract were various extensions of time, aggregating 1,425 days (Trans., folio 31,) granted by the Superintendent of Streets, under the direction of the Board of Supervisors, by resolutions "*duly adopted and passed,*" as *proved* by *defendant* on the trial (Trans., page 16, folio 29), extending the time from time to time till work completed and assessment issued. (Trans., pages 16 and 17.)

The plaintiff in the trial Court introduced in evidence the ASSESSMENT, DIAGRAM, WARRANT AND RETURN (Trans., page 11), and also the CONTRACT with extensions of time granted, and assignments thereto annexed (Trans., pages 14, 15 and 16), which *prima facie* proved "*the regularity and correctness of the assessment and of the prior proceedings and acts of the said Superintendent of Public Streets and Highways and Squares, and of the regularity of all the acts and proceedings of the Board of Supervisors upon which said warrant, assessment and diagram are based.*"

Stat. 1871–72, page 815, Sec. 12; *Jennings* vs. *Le Roy*, 63 Cal., 401; *Fanning* vs. *Leviston*, 93 Cal., 187.

The defendant introduced in evidence, as above stated, various orders, or resolutions of the Board of Supervisors granting extensions of time on said contract (Trans., pages 16 and 17), and also the extensions of time as actually made by the Superintendent of Streets by the authority of the Board (Trans., page 17, fol. 31.)

Defendant also introduced in evidence proceedings on the appeal to the Board of Supervisors by the grantor of defendant, and the resolution of the Board of Supervisors confirming the assessment after hearing respective parties (Trans., page 22, folio 40), thereby proving as true said paragraph 12 of complaint, conclusively, admitted true for want of denial under the practice in California. (46 Cal., 287, C. C. P., Sec. 437.)

The plaintiff also introduced in evidence bond of Charity Hayward, admitted to be the former owner, with the purchaser, the defendant herein, to indemnify and save harmless said defendant against the assessment involved in this suit. (Trans., page 22.)

There is no question of abuse of discretion of the Board, if it had the power to grant an extension after it elapsed, the same as it could before it expired.

The various resolutions duly extending the time to perform the work specified in the contract were ample, provided they had been obtained *before* and *not after the time had elapsed*, and that is the underlying question involved and urged in this case.

That is, the Supreme Court, in the case of *Taylor* vs. *Palmer*, 31 Cal., 246, construed Sec. 7 that the power might be exercised *after the time elapsed* (*Turney* vs. *Dougherty*, 53 Cal., 620), but the case of *Beveridge* vs. *Livingston*, 54 Cal., 54, decided December, 1879, held that time could not be extended after it had expired; and if so extended the order thus extending void.

The time was, in due form, extended by the Superintendent of Streets by orders or direction of the Board "*duly adopted and passed*," to May 9th, 1877, the defendant proved, and the work all done and assessment therefor issued April 11th, 1877; but some extensions granted after the time fixed had expired there is no question.

The findings cover only one issue, and that is: "That said Dougherty did not perform the work in said contract agreed to be performed within the time therein limited therefor or within the time extended for the performance thereof. * * * * * " (Trans., folio 17.)

That the work was done under the direction and to the satisfaction of the Superintendent of Streets there is no question.

The plaintiff in the trial Court claimed and contended that the contract and extensions of time were valid as the law was expounded by the Supreme Court of the State in the case of *Taylor* vs. *Palmer*, 31 Cal., 246, when the work under the contract was performed and the assessment was issued therefor, and that said contract and statute as construed and expounded by the highest Court of the State could not be annulled or assailed by giving subsequent decisions of the Court a *retroactive effect*, under the Constitution of the United States. (Trans., pages 18 and 24.)

Under the practice in California since 1873, Finding of Facts should embrace all the issues.

*Speegle* vs. *Leese*, 51 Cal., 415; *Leviston* vs. *Ryan*, 75 Cal., 293.

But a judgment will not be reversed, if *one* finding for defendant on a material issue is sufficient to support the judgment, conceding the findings in the affirmative on all the other allegations of the complaint.

*Spaulding* vs. *Bradley*, 79 Cal., 449; *Dougherty* vs. *Nevada Bank*, 81 Cal., 162; (Trans., pages 26 and 27.)

Hence the question of law is squarely presented on this record as to whether the time to perform said contract could be extended, *after* it had elapsed, as decided it could be in the case of *Taylor* vs. *Palmer*, 31 Cal., 246; and the extensions being made while said decision the law of the land, was not the subsequent overruling said decision of the Supreme Court the same in effect (giving it a *retroactive operation* on past contracts) as an Act of the Legislature re-

pealing the law forming a part of our contract and giving the repeal retroactive operation?

In other words, if the rule of construction of the Statute in 31 Cal., 246, governed this case, the judgment should have passed for plaintiff there is no question. If the decision in 54 Cal., 54, can have a retroactive operation on past contracts just the same as if the case in 31 Cal., 246, never had been decided, the judgment of the Supreme Court of California was right.

Under the rule of practice in California, C. C. P., Sec. 456, it will be presumed that the Board of Supervisors had jurisdiction to pass the various resolutions and orders defendant proved were "*duly passed and adopted,*" unless the facts required to give jurisdiction are controverted.

The above is suggested to illustrate that the case was not and could not have been decided on any other ground or theory than the overruling of the case in 31 Cal., 246, by the one in 54 Cal., 54.

As to all contracts entered into after the change of construction of Section 7 of the Street Law, or of similar provision under the present law, we have no contention.

## Assignment of Error.

The Supreme Court of California erred in holding and deciding that a change of the construction of a law by a judicial exposition thereof, giving it a *retroactive effect* upon contracts, did not impair the obligation of plaintiff's contract.

The plaintiff contended and argued in the Supreme Court of California the record shows (Trans., page 24) that the overruling of the case of *Taylor* vs. *Palmer*, 31 Cal., 246, (which held that the statute allowed the Board a discretion to extend the time *after it had* elapsed) by the subsequent decision of *Beveridge* vs. *Livingston*, 54 Cal., 54, impaired the obligation of his contract (Trans., fol. 32), for the contract was a valid one when made there is no question or contention, and if the time to perform the work could be legally extended, *after it expired*, by order of the Board "duly passed and adopted," as held in *Taylor* vs. *Palmer*, 31 Cal., 246 (Trans., folio 29), the contract in this case was a valid one when completed, April 11, 1877, and judgment should be reversed. That is, the State of California, by the Supreme Court, as the record shows (Trans., pages 24–25), had, previous to the execution of said contract for the performance of street work, construed the law, forming a beneficial part of his contract, and decided that the Board of Supervisors had the power and discretion to extend the time in which the work was to be performed *after the time had expired* (*Taylor* vs. *Palmer*, 31 Cal., 246), and that there had been no reversal or modification of said ruling prior to the time that the said contract for the assessment sued on was entered into and the power to extend the time for its performance exercised. In other words, the contract was made, and extensions granted, and work completed, and assessments issued to pay for the work contracted for and performed, between the dates of the decision in *Taylor* vs. *Palmer*, 31 Cal., 246, and *Beveridge* vs. *Livingston*, 54 Cal., 54, which last mentioned case overruled the case of *Taylor* vs. *Palmer* on the construction of the statute, and it then

became the law of the State that the Board of Supervisors had no power to grant *such extensions after time elapsed:* and the validity and obligation of the contract was thus impaired by the State, contrary to the provisions of Section 10 of Article I of the Constitution of the United States, prohibiting any State from passing any law impairing the obligations of contracts. (Trans., page 28.)

### Jurisdiction of the Case.

We anticipate that the defendant in error will contend that this Court will follow the latest decisions of the Supreme Court of the State on the construction of a statute, and that this case is one of that nature, and no Federal questions involved.

We claim that it is *the change* in the construction of the law that has impaired our contracts, and the record shows such to be the case.

The decision in this case (Trans., page 26, 81 Cal., 162) is founded on the authority of *Dougherty* vs. *Coffin*, 69 Cal., 455, which followed the case in 54 Cal., 54, and subsequent cases.

Hence, by reading the cases 31 Cal., 246, 53 Cal., 620, 54 Cal., 54, and this case 81 Cal., 162, there can be no reasonable doubt that the effect of a different construction of said Sec. 7 from that deliberately given it in 31 Cal., 246 (and the law of the State when plaintiff's contract made and under which work performed), has retroacted on the contract in this case and killed it, as the Court in substance say in 69 Cal., 455. That is, the case in 54 Cal., 54, killed the case of *Taylor* vs. *Palmer* 31 Cal., 246, and all contracts entered into and performed while said case the law of the land.

See *Murdock* vs. *City of Memphis*, 20 Wal., 633; *Phila. F. Ass'n* vs. *New York*, 119 U. S., 116; *Spencer* vs. *Merchant*, 125 U. S., 352, and cases cited; *Lent* vs. *Tillson*, 140 U. S., 324.

In the last case the Chief Justice of the Supreme Court of California made his certificate to the effect that there was drawn in question in the argument of the case the validity of a certain Legislative Act, and the decision was in favor of its validity, and this Court took jurisdiction of the case.

## Argument.

### Contracts Valid, Good and Secure, as the Law Construed, under Decisions of the Highest Court of California, all Rendered Null by the Court Below, by giving a Retroactive Effect to a Subsequent Decision of the Same Court on Same Section of the Law.

The underlying question for the Court to consider in this case is, do the facts as presented by the record here, and as above stated, show that the obligation of our contract has been impaired by the State of California?

That this Court will follow the latest decisions of the State Court on the construction of its statutes where the obligations of the contract are not impaired thereby, I do not question; nor will it take jurisdiction to consider whether the construction of a statute of the State as to *the future* contracts may be right or proper.

The contract in this case, under Sec. 7 of the Street law, ante page 3, expressly provided that all the work was to be done under the direction and to the satisfaction of the Superintendent of Streets (*Taylor* vs. *Palmer*, 31 Cal., 247), and that it was so done and an assessment in due form was regularly issued to the contractor on completion of the contract as his stipulated pay, within the time extended, is not questioned; but the sole objection was and is, that the *time had expired before the extension of time was granted.* (Trans., page 22, folio 5'.)

Under the construction of the statute of which the Act of April 1st, 1872, was but a re-enactment (*Bartemeyer* vs. *Iowa*, 18 Wall., 134, and presumably with same construction *Latson* vs. *Nelson*, XI Pac. Coast L. J., 591; *Robinson* vs. *Fair*, 128 U. S., 87), the Supreme Court held that the time could be and was well extended *after it had elapsed*, for the simple reason, we infer from prior decisions of the Court and of other Courts, that the property owners were not parties to such contract, and that *time* was not of the essence of public contracts, unless *expressly* so made, or plainly implied.

The learned counsel for respondent, in his brief in the Supreme Court of California, used the following language:

"3. *Taylor* vs. *Palmer* (31 Cal., 240) was a case arising under the Statute of 1863 (Stat. 1863, p. 525) The proceedings reviewed in *Dougherty* vs. *Coffin* (69 Cal., 454), and in this case, arose under the Statute of 1871-2 (Statutes 1871 and 1872, p. 807, Sec. 7). Nor did *Taylor* vs. *Palmer* go to the length of holding that a dead contract could be galvanized into life by the resurrecting power of a *post mortem* order of the Board of Supervisors. It was, moreover, overruled by *Beveridge* vs. *Livingstone* (*sup.*), in which the Court say:

" 'We are not inclined to be controlled by the authority of the former further than as it construes the exact language of the Statute of 1863, under which it was decided.' "

We agree with the learned counsel that *Taylor* vs. *Palmer* was squarely overruled by *Beveridge* vs. *Livingstone*, 54 Cal., 54, and that the latter case has been followed by the Supreme Court of California as the Iowa Court followed the case commented on, 1 Wall, p. 205, hereinafter cited.

By the application of the rule of construction in *Taylor* vs. *Palmer* to a similar provision in Sec. 7 of the Act of April 1st, 1872, which reads as follows: "And in all cases where the Superintendent, under the direction of said Board, has extended the time for the performance of contracts, the same shall be held to have been legally extended," the contract did not die by a failure to obtain an order *before* the time elapsed, and consequently did not need a resurrecting power of a *post mortem* order. But even if it did, the order of the Board is amply sufficient for the purpose, under the very letter and spirit of the statute as so expounded in *Taylor* vs. *Palmer*, 31 Cal., 246, hereafter quoted.

The extension of time is not a making of a new contract, but a mere continuing of the old, although the law be struck dead under which contract was made. (*Ede* vs. *Cogswell*, 79 Cal., 281.)

We have just quoted a clause in Sec. 7, of the Act of 1872, to show the legislative intent as favorable to granting an extension of

time during the prosecution of the work after the time had expired, as the Act of 1863 did. The Act of 1872 also contained provisions that the Act should be liberally construed to carry out the intentions and purposes of the Act (Stat. 1871–2, Sec. 28, p. 824). Applied in *Ede* vs. *Knight*, 93 Cal., 162.

Sec. 13 of said Act limits the defense as follows:

"First—Want of jurisdiction to order work.

"Second—That the assessment has been paid.

"Third—Fraud in the assessment, or in any of the acts or proceedings prior thereto, setting out the facts showing such fraud."

A similar provision of a law in regard to tax sales held valid in *Rollins* vs. *Wright*, 93 Cal., 397, following *De Treville* vs. *Small*, 98 U. S., 525.

As before stated, the statute expressly provided that the *work* in all contracts must be done under the direction and to the satisfaction of the Superintendent of Streets. Hence, if the Superintendent of Streets is satisfied and the Board of Supervisors also, with the diligence of the contractor in the prosecution of the work, and also the work itself, such determination would be final and conclusive upon the Courts under the rule announced by this Court in *Kihlberg* vs. *U. S.*, 97 U. S., 398, cited and applied in 109 U. S., p. 618, and 114 U. S., p. 550.

The Superintendent of Streets directs the work under the law and the contract, and extends the time while work is being prosecuted, under the authority of the Board, thereby upholding the diligence of the prosecution of the work.

The above is suggested, and we will hereafter more fully present the matter, to show that plaintiff in error has been denied equal protection of the law by giving a change to the construction of the law forming a part of the contracts a retroactive operation.

The following propositions seem to be established beyond controversy by the decisions of the Supreme Court of California and other States:

1.

*Property owners are not parties to a contract for street work.*

*Emery* vs. *Bradford*, 29 Cal., 84; *Hendricks* vs. *Crowley*, 31 Cal., 474; *Nolan* vs. *Reese*, 32 Cal., 485; *Hews* vs. *Reis*, 40 Cal., 255; *Dougherty* vs. *Henarie*, 47 Cal., 10; *Dyer* vs. *Barstow*, 50 Cal., 652; see *Alleghany City* vs. *Blair*, 74 Pa. St., 225; *Hubbard* vs. *Norton*, 28 Ohio St., 117; *Essex R. R. Co.* vs. *Shinkle*, 140 U. S., 340.

2.

*Time is not of the essence of the exercise of the authority, so far as the public is concerned, unless expressly so made.*

*Tuohy* vs. *Chase*, 30 Cal., 526; *Brady* vs. *Bartlett*, 56 Cal., 358; *People* vs. *E. L. and Y. C. Co.*, 48 Cal., 146, and cases cited; *Himmelmann* vs. *Cofran*, 36 Cal., 411; *People* vs. *Lake Co.*, 33 Cal., 487; *Shaw* vs. *Randall*, 15 Cal., 386; *U. S.* vs. *Freeman*, 3 How., 565; *French* vs. *Edwards*, 13 Wal., 511; *People* vs. *Cook*, 4 Seld., 89, and cases cited; *Gale* vs. *Mead*, 2 Denio, 161; *Looney* vs. *Hughes*, 26 N. Y., 514; *Pond* vs. *Negus*, 3 Mass., 231; *In Re Upson*, 89 N. Y., 67; *City of Lowell*

vs. *Hadley*, 8 Met., 180; *Williams* vs. *School District*, 21 Pick., 82; *Torrey* vs. *Millbury*, 21 Pick., 67; *Wheeler* vs. *Chicago*, 24 Ill., 109; *State* vs. *Lean*, 9 Wis., 292; *Hubbard* vs. *Norton*, 28 Ohio St., 116; Sedwick on Stat. Con., 2d Ed., pages 320-5; *Magee* vs. *Commonwealth*, 46 Pa. St., 358.

3.

*The laws in force at the time the contract was made enter into and form a part of the contract.*

*Bronson* vs. *Kinzie*, 1 How., 319; *Walker* vs. *Whitehead*, 16 Wal., 314; *Memphis* vs. *U. S.*, 7 Otto, 293; *McCauley* vs. *Brooks*, 16 Cal., 31; *Ede* vs. *Coyswell*, 79 Cal., 282.

The Statute as *construed and followed for years was the inducement for contractors to invest their capital.*

Probably more than 500 suits were brought on street assessments in San Francisco during the thirteen years between said decision in 31 Cal., 246, in 1866, and 54 Cal., 54, in 1879, and the correctness of the former decision never considered open for discussion, or even questioned, until the suggestion in *Turney* vs. *Dougherty*, 53 Cal., 619; hence what was stated in *Douglass* vs. *Pike Co.*, 101 U. S., pp. 679-80, applies with equal force in this case. In fact it was not unusual for the Board of Supervisors of the City and County of San Francisco to say to contractors, "go-a-head with your work, as we can grant you extension at any time under the ruling of the Supreme Court." That is, the consent, which is an executive act, *Babbage* vs. *Powers*, 130 N. Y., 291, was given before the order was actually made or passed.

In the case of *Taylor* vs. *Palmer*, *supra*, Mr. Justice Sanderson delivering the opinion of the Court, uses the following language:

"IV. The contract requires the work to be performed within thirty days. The work was not completed at the expiration of that time, and two days thereafter the time was extended by a resolution of the Board of Supervisors; and it is next urged that this extension was illegal and vitiated the whole proceedings because, as is claimed, the Board at the expiration of thirty days lost all jurisdiction.

"It may be that this point would have been good under the Act as passed in 1862, for while by the *seventh* section the Superintendent is authorized to fix the time for the commencement of the work, and under the direction of the Board of Supervisors to extend the time so fixed, he is not expressly authorized, either there or elsewhere, so far as we have been able to discover, to extend the time fixed for the completion of the work. But, be that as it may, this latter power is expressly conferred in that section as amended in 1863 (Statutes, page 526), in the following words: 'and said Superintendent shall fix the time for the commencement and completion of the work, under all contracts entered into by him, and may extend the time so fixed from time to time under the direction of the Board of Supervisors.' *Nor is it made necessary in terms that this power of extension should be exercised before the expiration of the time previously fixed.* On the contrary, it is provided in the succeeding

sentence, in general terms, that 'in all cases where the Superintendent, under the direction of said Board, has extended the time for the performance of contracts, the same shall be held to have been legally extended.' In view of these express provisions of the statute and the general language employed, there can be no doubt but that the extension given in this case was within the power of the Board of Supervisors."

At page 247 Mr. Justice Sanderson continues and explains the law in regard to the performance of contracts for street work in San Francisco.

That the point was squarely decided there is no question, it seems to me, and it was certainly followed by plaintiff in error and the Courts as a correct construction of the law till December, 1879, when overruled by the case in 54 Cal., 54.

The *reason* for the great hesitation of the Court in 53 Cal., 620, to question and not overrule the case in 31 Cal., 246, would seem to indicate stability and firmness of the judicial structure of the State, rather than instability on so vital a question to those who had invested in such enterprises, and firmly believed they had built on solid rock, and not on shifting sand. But in a few short months after opinion in 53 Cal., 620, came the decision in 54 Cal., 54, with the effect of an avalanche to those whose property was in contracts for street work, and swept away nearly $29,000 in this case. (Trans., page 11.) We do not contend a Court should not overrule a decision clearly wrong to follow in the future; but uniformity in the judicial department the country demands as a standard for business transactions.

As to all contracts made after decision in *Beveridge* vs. *Livingston*, we do not claim any Federal question involved.

The right of appeal from the assessment, secured by Sec. 12 of the said Act of April 1st, 1872, as well as prior Acts, did not begin to run until after the issuance of the assessment, and was dependent on that alone, and was not limited to nor dependent upon the time required, or granted, or taken, to perform the work.

The advantage intended to be secured to the property-owner was in no case to include an unconscionable privilege to defeat the statute and invalidate the assessment by reason of any non-compliance with any non-essential, the failure to comply with which in no way could affect the right of the property-owner, nor prejudice the rights of any person interested. The time fixed by the Superintendent of Streets for the performance of the work was not a condition precedent to the validity of the assessment. It was not intended for the security of the citizen, nor for insuring equality of taxation; it was not fixed by the statute. The statute authorized the Superintendent to fix it, and in the same clause almost he was authorized to extend it under the direction of the Board of Supervisors; the statute nowhere in express terms limits such extension to be granted within the time originally fixed for the completion of the work, and if it did, such limitation would not be of the essence of the thing to be done, and should be regarded as directory, and not mandatory.

There is no substantial reason why the extension to be granted might not as well have been granted after the time prescribed, if

such time had been prescribed, as before. There is no presumption that by allowing it to be so granted, it would work any wrong or injury. There is nothing in the Act itself to indicate that the Legislature did not intend that it should rather be done after the time prescribed, if such time had been prescribed, than not to be done at all. No negative words are used.

The statute itself provides that if the Superintendent of Streets, under the direction of the Board of Supervisors, has extended the time for the completion of the work, "*it shall be deemed and held to have been legally extended.*"

It shall be so deemed and held by whom—the contractor, the property-owner, the Superintendent?—no. by the Courts.

Both reason and authority abundantly sustain the decision of the Court in *Taylor* vs. *Palmer*, 31 Cal., 246, in our humble opinion. In fact, we do not perceive what other meaning the provision in Sec. 7 of the Act of April 1st, 1872, it was intended should have been given than as given it in 31 Cal., 246. I cannot conceive of any other object of the framers of said Section 7 of the statute in inserting the words that, "*in all cases where said Superintendent of Streets, under the direction of said Board of Supervisors, has extended the time for the performance of contracts, the same shall be held to have been legally extended.*"

What those words were inserted for, except to afford protection to the contractor in just such cases as this record shows, in performance of his contract, I cannot imagine; for before those words in the same section ample power is expressly given to fix the time to commence work, and also plenary power to extend the time so fixed for the completion of contract. There is no limit in that respect.

We have shown beyond any question, we think, that no right or remedy of the property-owner could be in the slightest degree prejudiced by the fact that an extension is granted *after* the time expired rather than *before* it expired.

The authority is amply sufficient for any case where it is exercised, and there is no question here as to abuse of authority.

If a principal should confer upon his agent power and authority to enter into all contracts for any kind of work, and to fix the time for performance, and *extend the time* under the advice of his attorney and counsel, and then provide that whenever time has been extended by his agent with the advice and consent of his attorney and counsel it should be deemed and held to be legally done or extended, would any person who could read and understand the English language contend that the principal could avoid his obligation because extension made after the original time fixed had elapsed before extension so granted?

Why should not the statute, which provides that "after jurisdiction to order work has been obtained, no irregularity in any of the subsequent proceedings shall render an assessment illegal," have like operation? Last part of Sec. 12, and Sec. 28 provides, "This Act shall be liberally construed to carry out the intentions and purposes of this Act." *Ede* vs. *Knight*, 93 Cal., 162.

To otherwise hold, we submit, is without reason, "special, partial and arbitrary," and in violation of fundamental principles of law. *Caldwell* vs. *Texas*, 137 U. S., 698.

Following the principle of *Taylor* vs. *Palmer*, the Supreme Court of California held that after work performed, time in which to make an assessment was "*not of the essence of power.*" *Himmelmann* vs. *Cofran*, 36 Cal., 413, followed in 69 Cal., 640, and 76 Cal., 547.

We have endeavored to show that a change in the construction of said section of the law could not be a semblance of benefit to the property-owner, but must work financial death and ruin to the contractor who invested his capital on the faith of such construction and the stability of the decision of the Court of last resort of the State.

The contractor had no other guide to follow, and after he reached the end of the road and commenced suit, he supposed that he was forever safe as to the past at least; but he was told that his guide was fallible; he took the wrong direction, and consequently ended in financial ruin. We submit that such doctrine too dangerous to be, and will not be sanctioned by this Court.

Before we come to the decisions of this Court applicable to the case we will notice a few of the decisions of the Supreme Court of California on the construction of statutes that had been acted upon in good faith and followed as a guide to acquiring property, as we did under 31 Cal., 246.

*The doctrine of stare decisis* may be briefly stated from well considered cases in California as follows: The construction by the Supreme Court of California of a similar provision of the statute became a part of the law itself and a rule of property, and the contractor may be deemed to have acted in performance of his contract in view of such exposition of the statute. *Clary* vs. *Rolland*, 24 Cal., 153; *Vassault* vs. *Austin*, 36 Cal., 696; *Smith* vs. *McDonald*, 42 Cal., 487. In last case, at page 488, the Court said: "The Legislature can make such change, if it be desirable, without the disturbance of titles which invariably follow such a change *when brought about by judicial decision.*"

The above doctrine on the construction of a statute was acknowledged in *Turney* vs. *Dougherty*, 53 Cal., 620, where the Court in construing the same provision of the Street law of 1872, Sec. 7, although somewhat in doubt about the correctness of the decision in *Taylor* vs. *Palmer*, 31 Cal., 246, uses the following language: "Were the question now for the *first time* presented to this Court, whether a valid extension of time could be granted after the expiration of the time fixed in the contract, we would feel great hesitation in holding, as was done in *Taylor* vs. *Palmer*, 31 Cal., 246, that an extension granted after the expiration of the time mentioned in the contract was valid."

Between the decision in 42 Cal., 488, and 54 Cal., 54, there was a change of one Judge only.

Hundreds of cases might be cited to establish the rule that, "*No deliberate decision should be reversed by the same Court where it has been generally accepted as the law, or wherever a reversal of it would be likely to disturb any right of property, or derange any general commercial custom.*"

For convenience we will quote from a few decisions of this Court we think applicable to and decisive of this case.

*Gelpcke* vs. *City of Dubuque*, 1 Wall., 205, is particularly applicable to the facts of this case, where the following language is used:

"It cannot be expected that this Court will follow every such oscillation, from whatever cause arising, that may possibly occur. The earlier decisions, we think, are sustained by reason and authority. They are in harmony with the adjudications of sixteen States of the Union. Many of the cases in the other States are marked by the profoundest legal ability.

"The late case in Iowa, and two other cases of a kindred character in another State, also overruling earlier adjudications, stand out, as far as we are advised, in unenviable solitude and notoriety. However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its Courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its Courts altering the construction of the law.

"The same principle applies where there is a change of judicial decision as to the Constitutional power of the Legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this Court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a Statute may be lost by its repeal. The rule embraces the case."

In *Louisiana* vs. *Pillsbury*, 105 U. S., 294, the Court, by Mr. Justice Field, said:

"The exposition given by the highest tribunal of the State must be taken as correct, so far as contracts made under the Act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law, as to the construction of a Statute. The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. * * * The Statute as thus expounded, determines the validity of all contracts under it. A subsequent change in its interpretation can affect only subsequent contracts. The doctrine is aptly and forcibly stated by the Chief Justice in the recent case in 101 U. S., 677.

"The true rule, he observes, is to give a change of judicial construction in respect to a Statute the same effect in its operation on contracts and existing contract rights, that would be given to a legislative amendment; that is to say, make it prospective, not retroactive. After a Statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the Statute as the text itself, and a change of decision is to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment." (Citing several cases.)

In *Butz* vs. *City of Muscatine*, 8 Wall., 584, the following language is used:

* "Here the remedy is taken away; not by a subsequent repeal,

but by subsequent judicial decision. The effect upon the contract is the same as if the provisions of the Code had been repealed."

In *Chicago* vs. *Shelden*, 9 Wal., 55, the Court said:

* * "A contract having been entered into between the parties, valid at the time by the laws of the State, it is not competent, even for its Legislature, to pass an Act impairing its obligation, much less could any decision of the Court have that effect."

In *Meriwether* vs. *Garrett*, 102 U. S., 520, it is said: "It is certainly of the highest importance to the people of every State that it should make provision, not merely for the payment of its own indebtedness, but for the payment of the indebtedness of its different municipalities. Hesitation to do this is weakness; refusal to do it is dishonor. Infidelity to engagements causes loss of character to the individual; it entails reproach upon the State.

"The Federal judiciary has never failed, so far as it was in its power, to compel the performance of all lawful contracts, whether of the individual, or of the municipality, or of the State. It has unhesitatingly brushed aside all legislation of the State impairing their obligation. When a tax has been authorized by law to meet them, it has compelled the officers of assessment to proceed and levy the tax, and the officers of collection to proceed and collect it and apply the proceeds. In some instances, where the tax was the inducement and consideration of the contract, all attempts at its repeal have been held invalid."

There is no question in this case but that this work was just as well done as if the extension of time had been obtained before time elapsed, and the property equally as much benefited, and the cost of the work not a farthing more.

For any delinquency in prosecuting the work the statute gave a remedy by remonstrance, and declares the effect of the decision conclusive. *Spaulding* vs. *Homestead Ass.*, 87 Cal., 46.

The cases in this Court hold that the inhibition is on the whole State, and that a change in the construction of the law which enters into contracts cannot any more have retroactive effect than legislative enactments as to the past.

In *Walker* vs. *Whitehead*, 16 Wal., 317, the Court, by Mr. Justice Swayne, said:

"The contract here in question is within the predicate of the Act. It was made more than six years before the Act was passed. The Act was retrospective—denounced a penalty not before prescribed for the non-payment of taxes—and, if such delinquency had existed for a single year, confiscated the debt by making any remedy to enforce payment impossible. The denunciation and the penalty came together. There was no warning and there could be no escape. * * *

"The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge and enforcement. Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment."

In *McGahey* vs. *Virginia*, 135 U. S., 667, the Court, by Mr. Justice Bradley, uses the following language:

"It has always been contended on the part of the bondholders that this Statute created a contract between them and the State, firm and inviolable, which the Legislature had no constitutional right to violate or impair; and such was, for several years, the uniform holding of the Supreme Court of Appeals of Virginia. See *Antoni* vs. *Wright*, 22 Grattan, 833, November Term, 1872; *Wise* vs. *Rogers*, 24 Grattan, 169; *Clarke* vs. *Tyler*, 30 Grattan, 134. A different view, however, has since been taken by the Court of Appeals, which now holds that the Act of 1871 was unconstitutional from its inception, being repugnant to certain provisions of the Constitution of the State adopted in 1869. An elaborate argument to this effect is contained in the opinion of the Court rendered in one of the cases now before us, *Vashon* vs. *Greenhow*, decided January 14th, 1886. In ordinary cases the decision of the highest Court of a State with regard to the validity of one of its Statutes would be binding upon this Court; but where the question raised is whether a contract has or has not been made, the obligation of which is alleged to have been impaired by legislative action, it is the prerogative of this Court, under the Constitution of the United States and the Acts of Congress relating to writs of error to the judgments of State Courts, to inquire, and judge for itself, with regard to the making of such contract, whatever may be the views or decisions of the State Courts in relation thereto.

"The decisions of this Court, therefore, in reference to the question whether a valid contract was made by the Statute in question between the State of Virginia and the holders of the bonds authorized by said Act, are to be considered as binding upon us, although a contrary view may have been taken by the Courts of Virginia; and in view of this principle of constitutional law, and of the decisions made by this Court, we have no hesitation in saying that the Act of 1871 was a valid Act, and that it did and does constitute a contract between the State and the holders of the bonds issued under it, and that the holders of the coupons of said bonds, whether still attached thereto or separated therefrom, are entitled, by a solemn engagement of the State, to use them in payment of State taxes and public dues. This was determined in *Hartman* vs. *Greenhow*, 102 U. S., 672, decided in January, 1881; in *Antoni* vs. *Greenhow*, 107 U. S., 679, decided in March, 1883; in the Virginia Coupon cases, 114 U. S., 269, decided in April, 1885, and in all cases on the subject that have come before this Court for adjudication. This question therefore may be considered as foreclosed and no longer open for consideration."

"The obligation of contracts is impaired by such legislation as lessens the efficacy of the remedy which the law in force at the time they were made provided for enforcing them."

*Louisiana* vs. *New Orleans*, 102 U. S., 203; affirmed and applied in *Seibert* vs. *Lewis*, 124 U. S., 294–5; cited and approved 129 U. S., 193.

Numerous other cases might be cited to the same effect, that this Court has never relaxed the rule in any case of retroactive legis-

lation or judicial construction, where rights, or remedies even, have been taken away or made less effectual thereby.

We think that the doctrine announced in the cases cited apply to the facts in this case, and if so, the judgment will have to be reversed.

The case of *People ex rel.* vs. *Supervisors*, 4 Barb., 64, draws the clear distinction between Acts which the law-making power may repeal without impairing the obligation of contracts, and also gives examples where Acts of the Legislature have been pronounced void where there was no written Constitution even, restraining the power of the Legislature.

PLAINTIFF IN ERROR DENIED EQUAL PROTECTION OF THE LAWS UNDER ART. XIV, SEC. 1, OF THE CONSTITUTION OF THE UNITED STATES.

There is also another reason for holding that the obligation of the contract in this case was impaired by judicial decision, and the plaintiff denied equal protection of the laws under Art. XIV., Sec. 1, of the Constitution of the United States.

The record here shows that Charity Hayward, wife of Alvinza Hayward, grantor of defendant, was the owner of the lot of land described in the complaint herein. (Trans., page 3, folio 6, and page 22, folio 41.)

That said Charity Hayward duly appealed to the tribunal authorized under Sec. 12 of the Act of April 1, 1872, viz.: The Board of Supervisors of said city and county, from said assessment on various grounds, and one was *that the extension of time to perform the work "was illegal and void."* (Trans., folio 38, page 21.)

Said appeal was taken by the same attorney who appeared for the defendant in this case in the Supreme Court of California and Superior Court of the City and County of San Francisco. The record shows that said appeal was regularly heard, witnesses were examined (Trans., folio 40, page 22), and the assessment confirmed and of course declared valid. If appellant had been successful on said appeal taken for her benefit, the assessment might have been set aside or annulled, as the Board had ample power to make such an order.

The same section of the Statute which gives the right of appeal (Sec. 12 of the Act of 1863, Stat. 1863, page 530, and of the Act of April, 1872, page 815,) declares that "*all the decisions and determinations of said Board of Supervisors shall be final and conclusive upon all parties entitled to an appeal.*"

Said provision of the law has been passed upon nearly fifty times by the Supreme Court of California, from *Emery* vs. *Bradford*, 29 Cal., 83, to *McVerry* vs. *Boyd*, 89 Cal., 310. See *Garrison* vs. *City of N. Y.*, 21 Wal., 196, cited in 109 U. S., 288; 131 U. S., 414; 133 U. S., 562, and 140 U. S., 340, which sustain beyond question the validity of such a provision of the law.

There was then an express decision and determination on the validity of the contract and extensions of time by the tribunal having undoubted jurisdiction of the subject matter and the parties, and the assessment was confirmed, and the contract by such decision declared valid.

The decision of the Board of Supervisors is given by the Act and the decisions of the Supreme Court of California the same force and effect as that of the decisions of the officers of the Land Department of the United States, "*final* and *conclusive*."

In the case of *Daniels* vs. *Tearney*, 102 U. S., 421, this Court uses the following language:

"It is well settled as a general proposition, subject to certain exceptions, not necessary to be here noted, that where a party has availed himself for his own benefit of an unconstitutional law, he cannot in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect." (Numerous cases cited.)

In the case of *Williams* vs. *Bruffy*, 102 U. S., 255, this Court, following prior decisions, would not entertain a suggestion that the Court had no jurisdiction in contradiction of the record, after a party obtaining a judgment on the merits.

In *Mohr* vs. *Manierre*, 101 U. S., 425, this Court, by Mr. Justice Field, plainly pointed out the obvious distinction between a plaintiff attacking his own proceedings taken for his benefit, and a case where notice required to be given to adversary to acquire jurisdiction. (See *Gage* vs. *Pumpelly*, 115 U. S., 461.)

In the Matter of Cooper, 93 N. Y., 512, the Court held that when one participates *as an actor* to obtain an order for his benefit, he takes his chances, and is estopped by the judgment.

To the same effect is *O'Dell* vs. *Rogers*, 44 Wis., 137; *Ames* vs. *Winsor*, 19 Pick., 247.

The case of *Dougherty* vs. *Coffin*, 69 Cal., 455, is a solitary case the other way, but that is not on the construction of any local law, and only authority so far as consistent with well-settled rules of law, and therefore not binding here. We respectfully submit neither reason nor authority support the case in 69 Cal., 455.

Applying the principles of the above cases to the facts in this case, we have a contract and assessment declared valid by a tribunal, with unquestioned jurisdiction and power to pronounce a decision in 1877, while the case of *Taylor* vs. *Palmer*, 31 Cal., 246, was the law of the land on the construction of the Statute, which all the departments of the State were bound to respect and follow. Certainly the Legislature could not pass an arbitrary Act giving any retroactive effect to such a decision, nor could the Court by judicial construction. Besides, the defendant, being a privy to the judgment and decision of the Board, ought not to be heard to say that if the decision had been in favor of defendant's grantor, it would have been binding; but as it was not, it was not bound by it. Such reasoning and ruling we say special, partial, and arbitrary (137 U. S., 698), and has the effect to deny to plaintiff in error, within the jurisdiction of the State of California, "equal protection of the laws" under Fourteenth Amendment to Constitution of United States. (See *P. S. Ass.* vs. *N. Y.*, 119 U. S., 116.)

## CONCLUSION.

If our contract and the obligations thereof have not been impaired by the judicial department of the State of California, by reason of the change in the construction of the law, and then giving such construction a retroactive application on past contracts, I am at a loss to know how more effectually they could be by a repeal of the law, and then construing such repeal to nullify all contracts entered into and fully performed while the law in force; or by amending a law and applying the amendment to the past as well as the future.

That the construction of Section 7 of the Street Law has been changed by the judicial department of the State there is no question; and if the obligations of our contract have been impaired by such change in the construction of the law, then this Court will grant us redress. If such change in the construction of the law and such application do not impair the obligations of our contract under the decisions of this Court we have cited, then our record fails to show that a Federal question is involved and our writ of error will have to be dismissed, or the judgment affirmed, for that reason. We think, however, that the record showing such facts plainly presents a Federal question to be considered, and that this Court should reverse the judgment.

The wisdom of the framers of our Federal Constitution in securing the obligations of contracts from impairment by any department of the State Government, and prohibiting any State from denying to any citizen within its jurisdiction equal protection of the laws, becomes more apparent year by year, and the decisions we have cited from the various reports in this Court show that such principle has been applied with unwearied diligence and inflexible firmness.

Respectfully submitted.

J. C. BATES,
*Attorney for Plaintiff in Error.*

December 10 '92